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In The

Supreme Court of the United States

October Term, 1998

SANTA MONICA BEACH, LTD.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

SANTA MONICA RENT CONTROL BOARD,

Real Party in Interest.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

Since 1941, *amicus curiae* California Apartment Association[1] ("the Association") has actively promoted the general welfare of the housing industry, including activities for the betterment of the communities in which its members transact their business, for the betterment of the relationships between landlords and tenants, for the betterment of the state's residential rental housing stock, and for the betterment of the social and civic conditions of the state of California and the nation.[2] Throughout its history, the California Apartment Association has supported many of its members in litigation to advance these efforts.

The Association is the largest statewide rental housing association in the United States. The Association is comprised of 19 regional chapters.[3] It has approximately

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[1] This brief is submitted with the written consent of all parties, filed with the Clerk of the Court. It was prepared exclusively by *amicus'* counsel at *amicus'* exclusive expense.

[2] The California Apartment Association was initially incorporated as the California State Apartment Conference.

[3] The Association is comprised of the following nineteen regional chapters: Action Apartment Association, Apartment Association of Greater Inland Empire, Apartment Association of Monterey County, Central Coast Rental Housing Association, Fresno Rental Housing Association, Kern County Apartment Association, Marin Income Property Association, North Coast Rental Housing Association, Rental Housing Association of Contra Costa, Napa and Solano Counties, Rental Housing Association of Northern Alameda County, Inc., Rental Housing Association of Sacramento Valley, Rental Housing Association of Central California, Rental Property Association of Merced County, Rental Property Owners' Association of Southern

18,500 individual members, who own or manage approximately 1.5 million units of residential rental housing in the state of California. Throughout the state, chapters and individual members of the Association have been and are involved in determining policies that affect the housing resources of the state.

Five of the Association's chapters are currently affected by rent control ordinances. In these jurisdictions, individual Association members are prohibited from collecting market rents by rent control ordinances that purport to correct social ills such as losses of poor, minority, young family and elderly tenants. But Association members in these areas far more frequently subsidize affluent, non-minority, non-young families, and non-elderly tenants at rents significantly below market rates – as a direct result of rent controls. Indeed, just as Santa Monica Beach originally alleged, the number of such tenants has dropped since the inception of rent controls, demonstrating that rent controls have failed to achieve their stated objectives.

The landlord in *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 81 Cal. Rptr. 93 (1999) is attempting what many landlords in rent-controlled jurisdictions would like to do – *prove by objective facts and evidence that rent controls exacerbate the very social problems they were meant to relieve.* The Association believes, and *Santa Monica Beach* is just one example, that rent controls are a

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Alameda County, San Diego County Apartment Association, San Francisco Apartment Association, San Joaquin Rental Property Association, Inc., South Coast Apartment Association, Tri-County Apartment Association.

reflection of failed housing policies that force individual landlords to pay for residential rental housing for all tenants because the state is unwilling or unable to effectively deal with the problem. But as long as the courts refuse to permit landlords to question the result of the application of these ordinances, property owners will remain the victims of paralyzed legislatures, and their property will continue to be taken without conferring any benefit to those tenants the ordinances were intended to benefit, all without just compensation.

At least eight communities are currently actively considering adopting rent control ordinances. Unless rent controls are applied to achieve their legislative purposes, adoption of such ordinances will merely hasten the exclusion of the poor, minorities, young families and elderly from rent-controlled communities.

The decision below blatantly disregards this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and effectively erases it from the books. Moreover, it reverses the thoughtful and reasoned decision of the court of appeal, and presents a sharply divided court, where three associate justices dissent, and one concurring associate justice actually seeks this Court's guidance! If that guidance is not provided, landlords in California and other jurisdictions will continue to struggle with the inequities of rent controls, with no relief in sight.

Santa Monica Beach merely wants the opportunity to prove that the rent controls that prohibit it from collecting market rents, and the forfeited rents themselves, do not and cannot meet the ostensible goals of the rent

control ordinance. It wants the opportunity to show that the tens of thousands of dollars it has been forced to forgo, and every lost dollar of lost future rent, has provided no advancement of the legislative purpose whatsoever – that these takings of actual dollars have served no purpose at all. But the lower court would deprive Santa Monica Beach of that opportunity, holding that as long as the *court* could *imagine* any possible benefit to *any possible recipient* – without regard to facts or evidence – no taking has occurred.

Santa Monica Beach's petition for *certiorari* presents issues important to every residential property owner:

Do rent control ordinances which demonstrably exacerbate the social problems they were ostensibly intended to reduce, constitute a taking of property in violation of the Fifth Amendment?

Should a landlord be prevented from challenging the application of a rent control ordinance simply because it states socially desirable goals even though he can allege and prove facts to show that it has the opposite effect?

STATEMENT OF THE CASE

California is the nation's most populous state, leading the way into the next millennium, currently challenged by many social problems that will reach sister states only in future decades. Housing for an increasing and diverse population is one of the state's chief concerns.

To date, fourteen jurisdictions in California have adopted rent controls, either by initiative or by ordinance. Landlords throughout California find themselves politically outnumbered by tenants and other housing advocates, and abandoned by state and local legislators, who see private landlords as the primary housing providers for the state. They see rent controls as a panacea for all the social ills that the state and local municipalities cannot or will not address – it is simply easier to force existing property owners to forfeit market rents to assuage tenant demands than it is to develop housing and housing policies which ensure adequate housing for all of the state's population. Since landlords are less numerous than tenants, the political fallout of rent controls is less threatening to legislators on every level.

A review of the ostensible goals of some of the rent controls enacted in California jurisdictions is illuminating. Each enumerates the same winning formula for passage:

> There is a shortage of decent, safe and sanitary housing the City of Los Angeles resulting in a critically low vacancy factor . . . .
>
> . . . . This situation has had a detrimental effect on substantial numbers of renters in the City, especially creating hardships on senior citizens, persons on fixed incomes and low and moderate income households . . . .

City of Los Angeles, Los Angeles Municipal Code Chapter XV, Section 151.01.

> There is a shortage of decent, safe and sanitary housing in the City and County of San Francisco resulting in a critically low vacancy factor. . . .

> . . . . This situation has a detrimental effect on substantial numbers of renters in the City, especially creating hardships on senior citizens, persons on fixed incomes and low and moderate income households . . . .

City and County of San Francisco, San Francisco Administrative Code Section 37.1(b)(1) and (2).

> On July 1, 1983, the City Council established a moratorium of rent increases for residential housing in the City of East Palo Alto, based upon the Council's findings of a pattern of excessive rent increases, a shortage of decent, safe and sanitary housing, and the resultant displacement of tenants due to their inability to pay increased rents. The Council found that the foregoing conditions created hardships for senior citizens, persons on fixed income and low and moderate income households.

City of East Palo Alto, City of East Palo Alto Ordinance 076, Section 2.A.

> . . . . The present shortage of rental housing units and the prevailing rent levels have a detrimental effect on the health, safety, and welfare of a substantial number of Oakland residents, particularly senior citizens, persons in low and moderate income households, and persons on fixed incomes who reside in the City.

City of Oakland, Ordinance 11758, Section 1.

> The purposes of this chapter are to regulate residential rent increases in the city of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to

> ensure compliance with the legal obligations relating to the rental of housing. This legislation is designed to address the city of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged.

City of Berkeley, Berkeley Municipal Code Section 13.76.030.

> The City Council hereby finds that there presently exists a critical shortage of rental housing within the City and surrounding areas . . . .
>
> . . . A substantial number of persons in the City who rent apartments are age sixty-five (65) or older and spend a high proportion of their income on rent. When low and moderate income tenants are displaced as a result of rent increases that they cannot afford to pay, they have extreme difficulty finding affordable apartments within the City . . . .

City of West Hollywood, Article VI, Chapter IV, Section 6401.

The stated goals of rent controls are socially responsible and admirable. The Association has no quarrel with them. But the actual results of rent controls are obvious and predictable, and deprive landlords of market rents *for no purpose*. This undeniably results in an unconstitutional taking without compensation.

ARGUMENT

I.

SANTA MONICA BEACH MUST BE PERMITTED TO SHOW THAT SANTA MONICA'S ORDINANCE DOES NOT SUBSTANTIALLY ADVANCE THE GOVERNMENT'S INTEREST, AND SO CONSTITUTES A TAKING.

The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. Statutes take property if they do not substantially advance legitimate state interests. *Nollan*, 483 U.S. at 835, fn. 3. In *Nollan*, this Court found that the state's taking of an easement did little to advance the justification for the justifying statute, constituting a taking without just compensation.

Nollan required consideration of the *results* of the statute, not just its stated goals. The Court considered not just the language of the statute, but the *actual evidence* of the effects of the statutory taking. Not only must the statute advance the state's interests, that advancement must be *substantial*.

Indeed, this Court held

> the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination . . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original).

The Santa Monica ordinance cannot meet this standard. The facts and evidence alleged by Santa Monica Beach directly challenge the ordinance's ability to do so. Yet Santa Monica Beach was not even permitted to make its showing at the trial court.[4] But the lower court found the ordinance in compliance with the Fifth Amendment through "imagination", opining about the possible benefits of rent controls in the face of contrary factual allegations.

Santa Monica Beach intended to present evidence that rent controls generally freeze rents, and permit across-the-board increases only for inflation. Many ordinances, like Santa Monica's, prohibit increases even upon a vacancy, continuing the same rent level from year to year, tenant to tenant, with only a fraction of the inflation rate increase from year to year.[5] The result after about twenty years is rents half of market rates, or even less, benefiting whoever the tenant may be – not just the classes described in the ordinance.

Controlled rents discourage development, since developers distrust communities that may deprive them of profits after development. Owners of existing units

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[4] One might ask the obvious question why the respondent is not eager to have its ordinance challenged by facts and evidence, and assume it knows that its ordinance could not meet any standard dependent on actual results.

[5] And to put teeth into these ordinances, they prevent evictions of tenants for all but specifically enumerated "good causes," so landlords cannot terminate for any but permitted grounds, which makes it impossible to terminate for drug dealing and prostitution, or even to refurbish an apartment.

seek ways to exclude themselves from rent controls, usually by converting to some form of owner-occupancy. This is particularly evident with single-family homes where considerable numbers of rental homes are sold from the rental housing stock to owner-occupancy, significantly reducing the family-based rental housing opportunities.

Controlled rents discourage small owners. Rent control programs must control every aspect of housing services, from utilities, to parking, to storage, to furnishings, with complex regulatory schemes involving hundreds of regulations changing frequently. These sophisticated issues discourage small landlords from maintaining their property, and they ultimately sacrifice it to corporate landlords more capable of handling intricate procedures.

Controlled rents lead to a more affluent tenant population. Tenant competition heightens with limited supply and arbitrarily frozen rents, so landlords seek the best financially qualified applicants, which leaves out the poor, and generally minorities, young families and the elderly. Tenant competition increases as affluent prospective tenants move into the community from outside areas, lured by the promise of artificially controlled rents.

Controlled rents result in fewer tenants overall. Tenants can get more for less, so the number of tenants in each unit drops. More affluent tenants use greater space, so more units have fewer occupants.

The result of rent controls? Less development, fewer units available, fewer poor, minority, young family and elderly tenants, competition from tenants outside the community, and fewer tenants in fewer units overall.

Rent controls not only do not achieve their objectives, but as they are applied in Santa Monica and other jurisdictions, they cannot.

These are the *facts* of rent control that Santa Monica Beach alleged in its complaint in *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993 (1999). These are the *facts* that the California Supreme Court held Santa Monica Beach could not be allowed to prove, since the court could *imagine* otherwise. These are the *facts* that prompt Santa Monica Beach to ask why it should be required to forgo market rents when that sacrifice has not achieved any purpose, and has intensified the problem.

Petitioner's questions are faced by California landlords every day in substantive ways. Landlords in municipalities that have adopted rent controls know, and can prove, that rent controls do not cure, but in fact exacerbate, the ills they are ostensibly intended to correct. But these same landlords continue to be forced to subsidize those for whom no benefit was ever intended, without compensation, and to exclude those for whom the ordinance was intended. The decision of the California Supreme Court compels these property owners to continue to endure the hardships of rent controls because the ordinances purport to better the community, while prohibiting these landlords from proving that these same ordinances do not.

The word "ostensibly" is used intentionally, and for good reason. If rent controls do not advantage the elderly, minority, small family and poor, whom do they benefit? The vast majority of tenants benefited have no special needs, and are not deserving of special governmental

concern. But, since they outnumber landlords, their will can be and is asserted to force landlords to subsidize them.

Surprisingly, or perhaps not so, not a single rent control ordinance in California provides for any tenant to qualify for rent controls. Not a single ordinance limits its effects to those it intends to benefit. Not a single ordinance even attempts to focus the resources of the landlords on the persons who meet the criteria of their enabling findings. Every rent control ordinance governs all rents for virtually every residential rental unit, for the benefit of any tenant who might live there.

The lower court held that as long as any tenant benefited from rent controls, a rational basis exists. But what does that mean in real life? In locations with a limited housing supply, tenants compete. The lower the rents, the greater the competition. If any tenant without special circumstances who benefits justifies rent controls, then that tenant deprives another with special circumstances from benefiting. That is the start of the exodus from rent controlled jurisdictions by those less financially capable.

This is the heart of the Takings Clause, which the framers intended to protect the minority from the power of the majority. The *only* reason for a taking is to substantially advance a legitimate government interest, and that advancement must be real, not imagined. If the real result is depressed rents for tenants not deserving of government protections, then landlords are being singled out to provide a general public benefit which should be borne by the public as a whole. *Armstrong v. United States*, 364

U.S. 40, 49 (1960). If the real result is depressed rents which exclude the tenants who are deserving of government protections – and the lower court conceded that it is – then there is by definition no government purpose at all and a taking has absolutely occurred.

Moreover, by holding that the municipalities face no accountability for their rent control ordinances, the decision of the California Supreme Court is an open invitation to communities to adopt rent controls by promising their citizenry the same lofty objectives promised to currently rent-controlled communities – affordable housing for the poor, minorities, young families and the elderly, and maintenance of diversity and a healthy housing stock. The same promises can and will be made to voters in other communities, who may respond with well-meant but entirely misplaced support to deprive landlords of their property, rather than working to adopt housing policies to be borne by the public at large.

In communities such as Santa Monica, the rent control ordinance has been passed by the city council, which owes its electoral soul to the larger voting bloc – tenants. In communities such as Berkeley, the rent control ordinance was the subject of initiative, passed by the voters with promises of responsible social engineering. Once passed, it is nearly impossible to demonstrate to the majority of voters – again, mostly tenants benefiting daily from depressed rents – that they should repeal the law because it harms others. Those benefiting are without special needs, but even they have no reason to vote against their self-interest, and so the law and its inherent unfairness is perpetuated.

As a result, property owners and the Association look to the Courts for relief.

The Constitution establishes a tripartite system of checks and balances, by which the executive and legislative branches are kept in check by the judicial. If either exceeds its authority, the courts are the refuge for the powerless. This is particularly true where the legislative or executive branches are responsive to the majority – the courts are the refuge of the less numerous and less powerful. But if the courts deliberately turn a blind eye to the actual proof that the executive or legislative branches have exceeded their authority and are exploiting the minorities, then minorities are sacrificed to the majority, and unconstitutional exploitation is encouraged.

The decision of the California Supreme Court in *Santa Monica Beach* is an open invitation for every political interest in every jurisdiction to imagine a socially responsible reason for rent controls (or any other ostensibly socially responsible legislation) and convince voters to pass them. If it turns out later that the law does not advance its stated goals, the California Supreme Court would say that as long as the reason was a good one to begin with, and it can imagine a rational connection, the law is valid, and no taking has occurred. In fact, the California Supreme Court would say that as long as the voters can be persuaded of a good reason just once, the law will forever stand even if the result is entirely contrary.

If that is the law, then the real minority, the property owners, have been victimized by the majority and abandoned by the courts.

The Association does not contend that no rent control law can pass Constitutional muster. Nor does it contend that the admirable stated goals of the Santa Monica ordinance and the others cited herein are misplaced. But it does contend that because these ordinances do not achieve their goals, and in fact impede them, the disproportionate burden placed on landlords without compensation is entirely without purpose and is therefore unconstitutional.

CONCLUSION

For each of these reasons, the Association respectfully requests that this Court grant Santa Monica Beach's petition for a writ of *certiorari* to review and overturn the decision below, which contravenes the authoritative decision of this Court, and denies landlords of any opportunity to prove statutory takings claims in the manner recognized by this Court.

Dated: April 21, 1999 Respectfully submitted,

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